IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No.2364-SB of 2006

Date of Decision: October 17, 2007

Pala Singh

...Appellant

VERSUS

State of Punjab

...Respondent

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Kundan Lal Chaudhary, Advocate,
for the appellant.

Mr.Shailesh Gupta, DAG, Punjab,
for the State.

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RANJIT SINGH, J.

Recovery of 21 bags of poppy-husk from a house allegedly belonging to appellant Pala Singh resulted in his conviction and sentence of ten years rigorous imprisonment coupled with fine of Rs.one lac. He has accordingly impugned his conviction by filing the present appeal.

The facts, in brief, are that on 18.1.2002 SI/SHO Manmohan Singh, while present at Bus Stand of village Sabhra for general checking etc., received a secret-information that the appellant was in the habit of dealing in poppy-husk and on the said date he was present in the area of village Sabhra near river Beas/Dhusi Bandh and was selling poppy-husk to his customers. Secret-information further disclosed that if raid was conducted, the appellant could be caught red handed with the contraband. Taking this information to be reliable, SI Manmohan Singh sent ruqa to the police station and formal FIR was registered against appellant Pala Singh. A wireless message was also sent to SDM Patti to come present at the place of raid. One Shangara Singh son of Angrej Singh of village Bhure Hathar also joined the police party and accordingly a raid was conducted. As per the evidence, appellant Pala Singh was found sitting on the gunny bags lying near river Beas/Dhusi Bandh. He, however, jumped into the river and swam across the other side on seeing the police party. Despite efforts on the part of police, the appellant could not be apprehended. In the meantime, SDM Patti, namely, Amarbir Singh also reached the place. Four gunny bags containing poppy-husk were recovered. The bags were weighed and found to be containing 30 Kgs. of poppy-husk each. Samples were drawn from each bag and sample parcels were separately prepared. The bags and the sample parcels were sealed with the seal bearing impression “MS”. The seal after use was handed over to the SDM. The samples were sent for chemical analysis. On completion of investigation, the challan was put up leading to the appellant being charge-sheeted and ultimately to his

conviction and the sentence. The case of the prosecution is supported by the evidence of police witnesses and the then SDM Patti (Amarbir Singh PW-3). The incriminating evidence and circumstances when put to the appellant under Section 313 Cr.P.C., he denied the allegations and pleaded false implication. He examined Shangara Singh (DW-1) and HC Tarsem Singh (DW-2) in support of his defence.

Learned counsel appearing for the appellant has raised number of pleas, but would mainly contend that the appellant was not arrested at the spot and as such could not be attributed with the recovery of the poppy-husk nor the same could be shown to have been recovered from the possession of the appellant which could be termed as his conscious possession over the contraband. Challenging the prosecution evidence, it is submitted that the identity of the appellant was also not properly established as the person, who allegedly knew the appellant, namely, HC Baljit Singh and who had identified him while he had bolted from the place, was not examined by the prosecution. It is accordingly pleaded that the prosecution did not succeed in proving the allegations of the offence against the appellant with reasonable assurance and it is prayed that the appeal be accepted.

Learned State counsel, on the other hand, has referred to the evidence of police witnesses to urge that the appellant was identified while he was running from the spot and the case of the prosecution would receive sufficient assurance from the evidence of SDM Amarbir Singh, who certainly was an independent witness. The State counsel accordingly pleads that no interference in this case is

called for.

Based on the rival contentions raised before me, it is required to be seen if any interference in this case is called for or not. The recovery of four bags of poppy-husk from an open space from a river bandh may not be much in dispute. However, there is serious dispute between the parties if this recovery can be attributed to the appellant or not. There is no dispute between the parties that the appellant was not arrested at the spot. It is pleaded by the prosecution that he had succeeded in escaping from the place on seeing the police party, whereas appellant pleads his false implication. This case is supported by the evidence of police witnesses and the then SDM Amarbir Singh (PW-3). PW-3 has appeared as a witness only to establish about the bags having been recovered from the river bandh. He otherwise is not a witness to the remaining facts. It is not understood as to how he was called at the spot to witness the recovery. The presence of a Gazetted Officer normally is needed when a personal search of an accused is required. Even before proceeding to conduct the raid, message has been sent to him to reach the place of recovery which may make the case to appear on some over doing. In any case, the recovery of these bags from river bandh being not in dispute, the prosecution was required to lead sufficient evidence to show that it belonged to the appellant or was in his conscious possession. To prove this fact, the prosecution has heavily relied on the version of police witnesses to say that the appellant was seen sitting on the bags and had escaped on seeing the police party. For identification of the appellant, reliance is mainly on the identification of the appellant

done by HC Baljit Singh and Shangara Singh independent witness. It is unfortunate to notice that HC Baljit Singh was not examined by the prosecution, whereas Shangara Singh was given up having been won over. He rather was examined as defence witness and accordingly would not lend any support to the case of prosecution. It is, as such, argued that the witnesses on whose basis identity of the appellant was established was not examined leaving a gapping whole in prosecution story. Evidence clearly shows that the appellant was not known to the Investigating Officer and his identity was disclosed to him by HC Baljit Singh or Shangara Singh. In this background, identity of the appellant before the court by the Investigating Officer as the one who was seen running away from the spot would not be safe in the absence of the evidence of those witnesses, who indeed had identified the appellant at the time he was seen running from the spot. In fact the counsel for the appellant has raised doubt about the presence of HC Baljit Singh and in this regard placed reliance on Exhs.D2/A and D2/B. These are the relevant entries of Register No.19 and Roznamcha, which would not support the fact that HC Baljit Singh had accompanied the raiding party. The trial court ignored these entries by referring to a fact that the recovery memo Exh.PB, which was prepared at the spot, is signed by HC Baljit Singh. Before discarding entries Exhs.D2/A and D2/B and preferring Exh.PB, the recovery memo, the trial court was required to consider that possibility of obtaining signatures on the recovery memo subsequently could not be ruled out. The evidence regarding presence of HC Baljit Singh at the spot was required to be taken into consideration by excluding any other possibility in this regard to lend

assurance to the case of prosecution. Why HC Baljit Singh was not examined is not forthcoming in any manner. If indeed he was present at the spot and had identified the appellant, no reasons or justification can be advanced not to examine him before the court. Being serving Head Constable in police, he could not have been won over to justify his non-examination. He was an official witness, who could have easily been produced. Though not argued before me in that manner, but his non-examination may also give rise to an adverse inference against the prosecution in terms of illustration (g) of Section 114 of the Evidence Act. The defence can be permitted to urge that this evidence which could be and is not produced would, if produced, be unfavourable to it, which has withheld the same from the court. This aspect would further require appreciation in the background that independent witness, who had allegedly accompanied the raiding party, was also not available to the prosecution for being examined as having been won over. Rather the appellant examined the independent witness as his defence witness who deposed before the court that no recovery was effected from the appellant in his presence and that his signatures were obtained on blank papers at Police Station, Patti. Merely because his signatures were existing on Exh.PB, which is the recovery memo, would not be enough to assume that he had accompanied the raiding party and was present at the time of recovery. The aspect of burden of proof on the defence and that which rests on the prosecution also needs to be noticed. As is well settled, the defence can succeed on preponderance of probabilities, whereas the prosecution can only succeed by proving its case to the hilt, i.e., beyond reasonable doubt.

The burden that rests on the defence is not that onerous as is on the prosecution and as such the defence would appear to have discharged the burden in showing the non-presence of the independent witness to link the appellant with recovery when it took risk of examining him as a defence witness, though he had been cited as a prosecution witness.

Even if this aspect of identification of the appellant is kept aside, the submission made is that the recovery effected from the open place could not be sufficiently established to be in conscious possession of the appellant or in his ownership. Except for the fact that appellant was seen sitting on the bags and had jumped to cross over to the other side of the river on seeing the police party, no other evidence is brought on record to show that these bags belonged to the appellant or at least were in his possession. A few judgments have been referred before me to say that mere presence of a person sitting on the bag would not be enough to prove his conscious possession over the same. Reference is also made to the case of ***Harbans Singh v. State of Punjab, 2000(4) R.C.R.(Criminal) 288.*** In this case 140 bags of poppy-husk were recovered from a truck whose driver had absconded. The accused therein were found sitting in the truck and were not shown to be the owners or transporting the bags. Their conviction was set-aside by this court on the ground that they could not be termed in conscious possession of the contraband. Reference is also made to the case of ***Surjan Singh alias Kala v. State of Punjab, 2005(4) R.C.R.(Criminal) 897.*** In this case, 27 bags of poppy-husk were recovered from the tractor-trolley where the accused was found sitting in the trolley. This court took a view that

merely sitting on a trolley from which the narcotic substances were eventually recovered does not constitute possession or even custody. Thus, the evidence that appellant was seen sitting on the bags and on seeing the police party he had run away in the background that his identification was not properly established, in my view, would not be enough either to establish his identity or to link him with the contraband recovered and to say that the same was in his conscious possession. Law in regard to circumstantial evidence is by now well established. For a prosecution to succeed on the basis of a circumstantial evidence, not only the circumstances relied upon should be fully established, but these circumstances so proved should lead to one and only one hypothesis of the guilt of the accused. The circumstances relied upon by the prosecution in regard to the presence of the appellant on the basis of which it is urged that the prosecution has established the offence against the appellant are neither sufficiently proved by reliable and cogent evidence nor are these of such a character which would rule out the possibility of his false implication. I am accordingly of the view that the prosecution did not succeed in proving the case against the appellant beyond reasonable doubt, benefit of which must accrue to him. It would not be safe to say that the identity of the appellant as the one who had run away from the spot was fully established. Even if that is accepted for the sake of argument, sufficient evidence was not led before the trial court to show that the contraband was in conscious possession of the appellant. The possibility also cannot be ruled out that the appellant, even if present at the spot, was not the person in possession of it. He could have run away from the place being

scared on seeing the police party. Something more than what has been established was needed to be proved and established on record before the prosecution could seek conviction of the appellant.

The present appeal is allowed and the judgment and order of conviction and sentence are set-aside. The appellant is acquitted of the charge levelled against him. His bail bonds and surety bonds stand discharged.

October 17, 2007 (RANJIT SINGH)
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